"In my opinion a 'final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one. . . . . In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again".

Plainly the striking out of a writ on a procedural objection is not a final order in the action.

The essential cardinal fact, however, simply is this: the order of January 20, 1969 was silent as to the caveat. Without an express order of the court for its removal the Collector of Land Revenue has no authority to remove any private caveat: see section 327. Until there is such an order the caveat remains on the register. The order of February 6, 1969 was therefore wholly superfluous.

We accordingly dismissed this appeal and made no order as to costs.

Appeal dismissed.

Solicitors: *Chin Swee Onn; Arulanandom & Co., Dharmananda & Co.*

MERLIMAU PEGOH LIMITED v. COLLECTOR OF LAND REVENUE JASIN

[A.C.J. (Sharma J.) July 21, 1969]

[Malacca — Land Reference No. 1 of 1968]

Practice and Procedure — Trial — Addresses at — Party making submissions in writing — Objection by other party — Inequality in the lasting qualities of the submissions — Unfairness to one side — R.S.C. 1957, O. 36 r. 36.

Order 36 rule 36 contemplates oral arguments and submissions. Counsel could of course address the court by reading out from the notes or by reading out the whole of the prepared submissions and the court is bound to give a hearing. On the ultimate analysis it may make very little difference to the result of a case whether the submissions were oral or in writing. However the court has power to ask or call for written arguments or submissions when necessary.

Cases referred to:—

(1) *Amjad Ali* v. *Suresh Ranjan Pal & Ors.* A.I.R. (1921) Cal. 426.

(2) *Trimbak* v. *Krishna Rao & Ors.* A.I.R. 1929 Nagpur 89.

LAND REFERENCE.

L. Kandan for the appellants.

Abdullah bin Ngah (Legal Adviser Negri Sembilan/Malacca) for the respondent.

Sharma J.: This land reference is before me to-day for argument. The learned Legal Adviser appearing on behalf of the respondent made his oral submissions and at the close of his submissions, the learned counsel for the applicants began his submissions and after making a few observations said that he had already prepared his written submissions and intended to hand over a copy of those submissions to me "in order to save the time of the court" as he put it. The counsel for the respondent objected to this procedure and said that as he had made only oral submissions, the counsel for the applicants had no right to put or hand in written submissions and that it was unfair to the respondent especially when he as the respondent's counsel was not supplied with a copy of those submissions. He also stated that if he knew that the applicant's counsel was going to make written submissions he himself would have liked to do the same.

Faced with that situation in the course of argument I have to determine and decide the objection which has been raised. I am informed by counsel that there is no authority on the point except that this practice is permitted by certain courts.

Order 36 of our Rules of the Supreme Court deals with trial. Part VII of Order 36 is headed "Proceedings At Trial" and this is covered by rules 31 to 55D. I may mention that by an unnoticed omission there seems to be no Part VIII of Order 36 as Part IX starts immediately after rule 55D. That, however, is not very relevant. Order 36 rule 36 deals with addresses at the trial and reads as follows:—

"Upon any trial the addresses shall be regulated as follows: the party who begins, or his counsel, may open his case before calling evidence and shall, whether or not his opponent adduces evidence, have the right of final reply, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any."

Order 36 rule 39 deals with entry of judgment *at* or *after* trial. This suggests that as far as entry of judgment is concerned it is a thing apart from the trial. In other words the use of the word "trial" in Order 36 means no more than the hearing of the suit or matter. *Jowitt* in the Dictionary of English Law says:—

"Under the practice in Chancery before the Judicature Acts, 1873-75, the hearing of a cause was the argument of it in court after the conclusion of the pleadings and the close of the evidence. In the case of a suit heard on motion for decree, the original hearing on the motion for decree frequently did not dispose of the suit, but made it necessary to have a subsequent hearing on further consideration. *Under the present practice the hearing of an action takes the form either of a trial or a motion for judgment.*"

Giving the meaning of trial, the same learned author goes on to say:—

"Trial, the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. A trial is the finding out by

due examination the truth of the point in issue or question between the parties, whereupon judgment may be given.

A trial is that step in an action, prosecution or other judicial proceeding, by which the questions of fact in issue are decided."

Wharton also defines trial as the *hearing* of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land.

According to *Byrne* "Trial is that step in an action, prosecution or other judicial proceeding, by which the questions of fact in issue are decided."

The evidence produced in court comes from the lips and mouths of witnesses (This may not be strictly true in case of documents produced). Cases are argued from the Bar and the word "address" used in Order 36 rule 36 connotes speech rather than writing. It may be a speech read out from a writing. When a person addresses another he says something by word of mouth, and what he says constitutes an address. I find it difficult to construe Order 36 rule 36, even if I were to strain its meaning, as implying that the submissions could be written out by counsel and handed over so that the court may read them and not that they may be read out to the court. It amounts to this that such submissions should in those circumstances constitute an address *made* by the counsel. I have already said that the counsel could address the court by reading out from the notes or even by reading out the whole of the prepared written submissions. The court is bound to give a hearing. The court is bound to hear the counsel. I do not suppose it has ever been suggested that the court is bound to accept written arguments by the counsel and to read those arguments. The court may do so but the question is whether the court is bound to do so. The law requires the court to hear the counsel. I am quite conscious that in the ultimate analysis it may make very little difference to the result of a case whether the submissions are oral or in writing. I believe a judge is, at this period in the history and practice of law, more of a mechanism or an instrument, though animate yet who is neither affected by the burst of eloquence nor influenced or carried away by the sheer force and sublimity of thought stated in the writing. It may, however, seem to others that written arguments submitted to the court, may, if read, create a more favourable and lasting impression in favour of the party submitting them, especially if the judgment is reserved. The effect of oration may wither and disappear. It may therefore be thought that in that sense there may be an inequality in the lasting qualities of these two forms of address and hence some unfairness to one side.

The *Shorter Oxford English Dictionary* defines the word "address" as "a set discourse (less oratorial than a *speech*, less systematic than a *sermon*)". It obviously implies the use of speech. Similarly the *Concise Oxford English Dictionary* gives its meaning as "a discourse delivered to audience."

The expression "hearing of the suit" means the hearing at which the judge takes down the evidence or hears arguments, or considers questions relating to the determination of the suit which enable him finally to come to an adjudication upon it. The duty of the court is to hear arguments and not to read a bundle of papers submitted to it in lieu of arguments. I uphold the objection as I am of the view that Order 36 rule 36 contemplates oral arguments and submissions. I should, however, make it clear that I am not ruling that the court has no power to ask or call for written arguments or submissions. I only construe Order 36 rule 36 as I read it and I do not require any written submissions in this case. It is not a case in which the court should fall back on its inherent powers.

I find the matter was dealt with in *Amjad Ali v. Suresh Ranjan Pal and others*[1] where Sanderson C.J. delivering the judgement of the divisional court said:—

"With regard to the question of submitting the notes to the learned additional sessions judge, we are of opinion that, when a case has been fully argued, as it was in this case, before a learned judge, it ought not to be necessary for the learned pleaders to submit notes of their arguments. It is the duty of the learned judge to take such notes of the arguments as he thinks fit when they are being submitted to the court; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open court in the presence of the other side. If it becomes necessary as in some exceptional cases it may become necessary, for the learned judge either to require or to receive notes of the learned pleader's arguments, such notes ought not to be submitted to the learned judge by the learned pleader on one side, without first submitting the notes to the learned pleader on the other side."

In the case of *Trimbak v. Krishna Bao and others*[2] Kinkhede Acting C.J. said:—

"Then it is argued that in not permitting the appellant to file a written argument by way of reply this court has contravened the provisions of R.16, O.41, Civil Procedure Code. All that the Rule compels the court to do is to hear the argument if any addressed and not to permit written argument. It was open to appellant 2 who was personally in attendance to address such verbal arguments as he may have desired. He was not prevented from doing so."

Objection upheld.

Solicitors: *Shearn, Delamore & Co.*